M Prabhkaran v Salam bin Seran

HIGH COURT (TAIPING) — CIVIL APPEAL NO 11–16 OF 1997
VT SINGHAM JC
11 JUNE 2001

Civil Procedure *— Amendment — Defence — Amended defence filed only after close of plaintiff's case and after commencement of defence case — Whether plaintiff entitled to raise complaint over delayed filing at appeal*

Civil Procedure *— Pleadings — Defamation — Defendant filed amended statement of defence raising qualified privilege — Plaintiff intended to rely on express malice to defeat plea of qualified privilege — Whether plaintiff should have served reply to amended statement of defence providing particulars of express malice — Whether mandatory on plaintiff to serve reply with particulars of malice under Subordinate Courts Rules 1980 O 44 r 3(3)*

Evidence *— Documentary evidence — Admissibility of — Documents supporting defendant's case produced only at hearing of defence case — Plaintiff failed to raise objections during submissions at trial — Whether plaintiff entitled to raise objections at appeal — Whether documents correctly held admissible at trial*

Tort *— Defamation — Malice — Defendant lodged police report regarding plaintiff's alleged threat towards him — Whether any basis on which inference may be drawn that defendant actuated with malice in making police report — Meaning of 'malice'*

Tort *— Defamation — Police report — Defendant lodged police report regarding plaintiff's alleged threat towards him — Whether defendant acted with malice or made false report in making police report against plaintiff — Whether defendant made police report with honest belief in threat of harm by plaintiff*

Tort *— Defamation — Qualified privilege — Defendant lodged police report regarding plaintiff's alleged threat towards him — Defendant acting in accordance with sense of duty and in bona fide protection of legitimate interest — Whether defence of qualified privilege favoured defendant*

In July 1990, an anonymous letter dated 29 June 1990 ('IDD5') was sent to, inter alia, the Education Department of Parit Buntar, alleging immoral conduct against a teacher ('DW11') who was employed at the school in which the defendant/respondent was the headmaster. On receipt of the letter, the assistant education officer of the district of Kerian, 'DW2', sent a copy of IDD5 to the defendant and instructed the defendant to investigate the complaint and to forward a complete report to the department. The defendant carried out an investigation and interviewed DW11, who allegedly informed the defendant that IDD5 was written by her estranged lover, the plaintiff/appellant, who had threatened to do anything possible to terminate her services at the school and had been making inquiries about the defendant's whereabouts in contemplation of doing something to the defendant for not having terminated her employment contract. The defendant forwarded his report to the education officer of the district of Kerian.

The State Deputy Director of Education Perak, Ipoh ('DW4'), instructed the defendant to advise DW11 and a warning letter was issued to the latter. On 1 August 1990, DW11 reiterated the threat of the plaintiff against the defendant in the presence of two fellow teachers, DW7 and DW8, adding that the plaintiff had located and been to the defendant's house when the defendant had not been there. The defendant reported the matter to his superior, DW4, who instructed him to lodge a police report, which the defendant accordingly did on 1 August 1990. The plaintiff brought an action for libel against the defendant for lodging the police report against him, wherein the defendant was alleged to have falsely stated and published the contents of the report with bad faith or malice against the plaintiff. The Magistrate's Court, Parit Buntar, dismissed the plaintiff's claim against the defendant and he appealed.

Held, dismissing the appeal:

(1) The defendant had just cause for making his police report and he had not acted with malice or made a false report. The defendant had been worried and frightened, which was a natural feeling and expected of any reasonable minded person that something would happen to him after he had been told by DW11 of the threat and the intended harm by the plaintiff and he had merely passed on his fears to the police, and the police had acted independently. The defendant was not prompted by malice against the plaintiff when he lodged the police report on 1 August 1990 and there was absolutely no basis for him to falsely invent the story of the plaintiff's threat against him and his predominant desire was purely to place his safety in the hands of the police (see p 385F–H). On the facts and circumstances of the case, the police report lodged by the defendant was held to have been made with an honest belief that he was threatened with harm by the plaintiff as told to him by DW11 (see p 385H–I).

(2) On the plaintiff's own evidence, there was no basis for the trial court or this court to draw any inference that the defendant's police report had been actuated with malice (see p 386B); *Caswell v Powell Duffryn Associated Collieries Ltd* [1940] AC 168 followed. 'Malice' in general defamation use meant 'any ill will, spite or some wrong which can defeat a defence of qualified privilege' and making use of the occasion for some indirect purpose. In this case, there was no evidence that the defendant had made use of the occasion for any indirect purpose other than for a lawful purpose to secure his safety. There was also no evidence that the defendant had been actuated by some indirect motive or connected with the privilege or had made use of the occasion or had been under the influence of some indirect motive (see p 386E–F); *Browne v Dunn* (1893) 6 R 67 and *Hoare v Jessop* [1965] EA 218 followed.

(3) The defendant had acted in accordance with the sense of duty and in bona fide protection of his own legitimate interest. In fact, he owed a duty, whether it was labelled as social, moral or legal duty, to draw the attention of the police to seek redress for his grievance, namely, the threat of the plaintiff which DW11 had informed him about (see p 386F–G); *Adam v Ward* [1917] AC 309 and *Abdul Rahman Talib v Seenivasagam & Anor* [1965] MLJ 142 followed. On the facts and circumstances of this case, the defence of qualified privilege was in favour of the defendant. Consequently, on the facts and on the balance of probabilities, the plaintiff had not succeeded in showing malice against the defendant when he lodged the police report (see p 387F–G).

(4) In the absence of any objection raised on behalf of the plaintiff at the lower court on the amendment to the statement of defence after the close of the plaintiff's case, which included the defence of qualified privilege, this court was unable to accept the complaint raised for the first time on appeal. A party could not be allowed to lie by until the case came up for hearing before the Court of Appeal and then raise his complaint for the first time of the amendment, when this opportunity to object was available to the party at the trial (see p 388G–H).

(5) Where the plaintiff wished to rely on express malice on the part of the defendant in order to defeat the plea of qualified privilege, he would have to plead to this effect and give particulars of facts and matters from which he alleged the malice was to be inferred and this should have been done by way of reply and not in the statement of claim (see p 389G–H); *Abdul Rahman Talib v Seenivasagam & Anor* [1965] MLJ 142 and *Janagi v Ong Boon Kiat* [1971] 2 MLJ 196 followed. It was a mandatory requirement on the part of the plaintiff to have served a reply giving particulars of the facts and matters from which the malice was to be inferred as required under O 44 r 3(3) of the Subordinate Courts Rules 1980 ('the SCR'). However, since the plaintiff had failed to serve a reply pleading express malice as required under O 44 r 3(3) of the SCR, he could not be allowed to rely on express malice without having served the reply to defeat the defence of qualified privilege, as only the reply would have formed the pleadings in the civil suit (see p 392A–B).

(6) As to plaintiff's counsel's complaint that the documents produced on behalf of the defendant were only produced during the hearing of the defendant's case, this complaint had not been specifically raised in the submissions before the magistrate to the effect that no weight or less weight should have been given to those documents, but was only raised for the first time on appeal. This should have been raised during the submissions at the trial and it was too late to raise it now. In any event, the documents complained about were clearly admissible to show the respective role and functions of DW2 and DW4, the sequence of events

which made DW11 inform the defendant of the plaintiff's threat and to corroborate the oral evidence of the defendant, and the evidence had been correctly held to be admissible by the magistrate (see p 392C–F). As for the plaintiff's counsel's contention that IDD5 should not have been considered by the magistrate, for the purpose of this case, all that was relevant was that such a letter existed and the magistrate was not prejudiced or clouded when he considered that such a letter existed as he did not admit the contents of the said letter (see p 393F–H).

[Bahasa Malaysia summary

Pada bulan Julai 1990, satu surat tanpa nama bertarikh 29 Jun 1990 ('IDD5') telah dihantar ke, antara lain, Jabatan Pendidikan Parit Buntar, yang mendakwa perbuatan tidak bermoral terhadap seorang guru ('DW11') yang telah diambil bekerja di sekolah di mana defendan/responden adalah guru besarnya. Setelah menerima surat tersebut, penolong pegawai pendidikan daerah Kerian, 'DW2', telah menghantar sesalinan IDD5 kepada defendan dan mengarahkan defendan menyiasat aduan tersebut dan mengemukakan satu laporan lengkap kepada jabatan. Defendan telah menjalankan siasatan dan menemuramah DW11, yang didakwa telah memberitahu defendan bahawa IDD5 telah ditulis oleh kekasih beliau yang telah ditinggalkan, iaitu plaintif/perayu, yang telah mengugut berbuat apa sahaja mungkin untuk menamatkan perkhidmatan beliau di sekolah tersebut dan telah membuat pertanyaan tentang di mana defendan berada dengan harapan untuk berbuat sesuatu kepada defendan kerana tidak menamatkan kontrak pekerjaan DW11. Defendan telah mengemukakan laporan beliau kepada pegawai pendidikan daerah Kerian. Timbalan Pengarah Pendidikan Negeri Perak, Ipoh ('DW4'), telah mengarahkan defendan menasihati DW11 dan satu surat amaran telah dikeluarkan kepadanya. Pada 1 Ogos 1990, DW11 mengulangi ugutan plaintif terhadap defendan dengan kehadiran dua orang guru, DW7 dan DW8, dan menambah bahawa plaintif telah menjumpai dan telah pergi ke rumah defendan semasa defendan tidak berada di situ. Defendan telah melaporkan perkara tersebut kepada ketua beliau, DW4, yang mangarahkan beliau membuat laporan polis, yang defendan dengan wajarnya telah lakukan pada 1 Ogos 1990. Plaintif telah memulakan satu tindakan libel terhadap defendan kerana membuat aduan polis terhadap beliau, di mana defendan didakwa telah dengan salah menyatakan dan menerbitkan kandungan laporan tersebut dengan niat jahat terhadap plaintif. Mahkamah Majistret, Parit Buntar, telah menolak tuntutan plaintif terhadap defendan dan beliau membuat rayuan.

Diputuskan, menolak rayuan tersebut:

(1) Defendan mempunyai sebab yang baik untuk membuat laporan polis beliau dan beliau tidak bertindak dengan niat jahat atau

membuat satu laporan palsu. Defendan risau dan takut, yang merupakan perasaan biasa dan dijangkakan oleh sesiapa yang berfikiran waras bahawa sesuatu akan berlaku ke atas dirinya setelah beliau diberitahu oleh DW11 tentang ugutan dan kecederaan yang diniatkan oleh plaintif dan beliau hanya menyampaikan rasa takut beliau kepada pihak polis, dan pihak polis telah bertindak secara bebas. Defendan tidak digalakkan oleh niat jahat terhadap plaintif semasa beliau membuat laporan polis pada 1 Ogos 1990 dan tiada sebab langsung untuk beliau mereka-reka dengan salah cerita ugutan plaintif terhadap beliau dan niat utama beliau hanyalah memikirkan keselamatan beliau dalam jagaan pihak polis (lihat ms 385F–H). Berdasarkan fakta-fakta dan keadaan-keadaan kes, laporan polis yang dibuat oleh defendan diputuskan telah dibuat dengan kepercayaan bahawa beliau diugut untuk dicederakan oleh plaintif sebagaimana yang diberitahu kepadanya oleh DW11 (lihat ms 385H–I).

(2) Berdasarkan keterangan plaintif sendiri, tidak terdapat apa-apa sebab untuk mahkamah perbicaraan atau mahkamah ini tiba kepada apa-apa inferens bahawa laporan polis defendan telah didorong oleh niat jahat (lihat ms 386B); *Caswell v Powell Duffryn Associated Collieries Ltd* [1940] AC 168 diikut. 'Niat jahat' dalam penggunaan umum fitnah bermaksud 'apa-apa rasa jahat, busuk hati atau sesuatu yang salah yang boleh mengalahkan satu pembelaan perlindungan bersyarat' dan menggunakan keadaan tersebut untuk suatu tujuan yang tidak langsung. Dalam kes ini, tiada keterangan bahawa defendan telah menggunakan keadaan ini untuk apa-apa tujuan yang tidak langsung selain daripada tujuan yang sah untuk menjamin keselamatan beliau. Tiada juga keterangan bahawa defendan telah didorong oleh suatu motif yang tidak langsung atau berkaitan dengan perlindungan tersebut atau telah menggunakan keadaan tersebut atau berada di bawah pengaruh suatu motif yang tidak langsung (lihat ms 386E–F); *Browne v Dunn* (1893) 6 R 67 dan *Hoare v Jessop* [1965] EA 218 diikut.

(3) Defendan telah bertindak bersesuaian dengan sifat kewajipan dan secara bona fide untuk melindungi kepentingan sah beliau sendiri. Bahkan, beliau mempunyai satu kewajipan, sama ada ia dilabelkan sebagai kewajipan sosial, moral atau undang-undang, untuk menarik perhatian pihak polis memohon tebus rugi untuk kilanan beliau, terutamanya, ugutan plaintif yang DW11 telah beritahu kepada beliau (lihat ms 386F–G); *Adam v Ward* [1917] AC 309 dan *Abdul Rahman Talib v Seenivasagam & Anor* [1965] MLJ 142 diikut. Berdasarkan fakta-fakta dan keadaan-keadaan kes ini, pembelaan perlindungan bersyarat menyebelahi defendan. Akibatnya, berdasarkan fakta-fakta dan atas imbangan keberangkalian, plaintif gagal untuk menunjukkan niat jahat terhadap defendan semasa beliau membuat laporn polis tersebut (lihat ms 387F–G).

(4) Dengan ketiadaan apa-apa bantahan yang ditimbulkan bagi pihak plaintif di mahkamah bawahan tentang pindaan kepada penyataan pembelaan selepas kes plaintif selesai, yang termasuklah pembelaan perlindungan bersyarat, mahkamah ini tidak dapat menerima aduan yang ditimbulkan buat kali pertama atas rayuan. Satu pihak tidak boleh dibenarkan mendiamkan diri sehingga kes timbul untuk dibicarakan di hadapan Mahkamah Rayuan dan masa itu barulah menimbulkan aduan beliau buat kali pertama tentang pindaan tersebut, apabila peluang untuk membantah ini sedia ada untuk pihak itu di perbicaraan tersebut (lihat ms 388G–H).

(5) Di mana plaintif berhasrat untuk bergantung kepada niat jahat yang nyata di pihak defendan bagi tujuan menggagalkan pli perlindungan bersyarat, beliau harus membuat pli terhadapnya dan memberikan butiran-butiran fakta dan perkara-perkara daripada mana inferens tentang dakwaan beliau tentang niat jahat tersebut dibuat dan ini sepatutnya dibuat melalui jawapan dan bukan dalam penyataan tuntutan (lihat ms 389G–H); *Abdul Rahman Talib v Seenivasagam & Anor* [1965] MLJ 142 dan *Janagi v Ong Boon Kiat* [1971] 2 MLJ 196 diikut. Ia merupakan satu keperluan mandatori di pihak plaintif untuk menyampaikan satu jawapan yang memberikan butiran-butiran fakta dan perkara-perkara daripada mana inferens niat jahat tersebut dibuat sebagaimana yang diperuntukkan di bawah A 44 k 3(3) Kaedah-Kaedah Mahkamah Rendah 1980 ('KMR'). Namun begitu, memandangkan plaintif telah gagal untuk menyampaikan jawapan memplikan niat jahat yang nyata sebagaimana yang diperuntukkan di bawah A 44 k 3(3) KMR, beliau tidak boleh dibenarkan bergantung kepada niat jahat yang nyata tanpa menyampaikan jawapan untuk menggagalkan pembelaan perlindungan bersyarat, kerana hanya jawapan tersebut akan membentuk pliding-pliding dalam guaman sivil (lihat ms 392A–B).

(6) Mengenai aduan peguan plaintif bahawa dokumen-dokumen yang dikemukakan bagi pihak defendan hanya dikemukakan semasa perbicaraan kes defendan, aduan ini tidak secara khusus ditimbulkan dalam penghujahan di hadapan majistret yang membawa kesan bahawa tiada kepentingan atau kurang kepentingan patut diberikan terhadap dokumen-dokumen tersebut, tetapi hanya ditimbulkan buat kali pertama semasa rayuan. Ini sepatutnya telah ditimbulkan semasa penghujahan di perbicaraan tersebut dan adalah terlalu lambat untuk menimbulkannya sekarang. Dalam apa-apa keadaan, dokumen-dokumen yang telah diadukan dengan jelas boleh diterima untuk menunjukkan peranan dan fungsi DW2 dan DW4, urutan kejadian-kejadian yang membuat DW11 memberitahu defendan tentang ugutan plaintif dan menyokong keterangan lisan defendan, dan keterangan tersebut telah diputuskan dengan betul untuk boleh diterima oleh majistret (lihat ms 392C–F). Perbalahan peguam plaintif bahawa

IDD5 tersebut tidak sepatutnya dipertimbangkan oleh majistret, bagi tujuan kes ini, apa yang relevan adalah bahawa surat itu wujud dan majistret tidak prejudis atau kabur semasa beliau mempertimbangkan bahawa surat itu wujud kerana beliau telah tidak menerima masuk kandungan-kandungan surat tersebut (lihat ms 393F–H).]

Notes

For cases on amendment of defence, see 2(1) *Mallal's Digest* (4th Ed, 2001 Reissue) paras 437–452.

For cases on pleadings in a defamation case, see 2(3) *Mallal's Digest* For cases on admissibility of documentary evidence, see 7 *Mallal's Digest* (4th Ed, 2001 Reissue) paras 989–994.

For cases on defamation generally, see 12 *Mallal's Digest* (4th Ed, 2000 Reissue) paras 193–409.

(4th Ed, 2001 Reissue) paras 4481–4484.

Cases referred to

AB Ltd, Re [1956] MLJ 197 (refd)

Abdul Rahman Talib v Seenivasagam & Anor [1965] MLJ 142 (folld)

Abdul Rahman Talib v Seenivasagam & Anor [1966] 2 MLJ 66 (distd)

Adam v Ward [1917] AC 309 (folld)

Allied Capital Sdn Bhd v Mohamed Latiff Shah Mohd and another application [2001] 2 MLJ 305 (refd)

Bank of China v Asiaweek Ltd [1991] 2 MLJ 505 (distd)

Benmax v Austin Motor Co Ltd [1955] 1 All ER 326 (refd)

Browne v Dunn (1893) 6 R 67 (folld)

Caswell v Powell Duffryn Associated Collieries Ltd [1940] AC 152 (folld)

China Airlines Ltd v Maltran Air Corp Sdn Bhd (formerly known as Maltran Air Services Corp Sdn Bhd) and another appeal 1996] 3 MLJ 517 (refd)

Chock Kek Ling v Patt Hup Transport Co Ltd & Ors [1966] 1 MLJ 120 (refd)

Clarke v Edinburgh Tramways Co 1919 SC (HL) 35 (refd)

Commercial Union Assurance (M) Sdn Bhd v Ng Chek Hung and another appeal [1997] 2 MLJ 465 (refd)

Croucher v Inglis (1889) 16 R (refd)

Green v Chalmers (1878) 6 R 318 (refd)

Hasnul bin Abdul Hadi v Bulat bin Mohamed & Anor [1978] 1 MLJ 75 (distd)

Henry Wong v John Lee & Anor [1980] 2 MLJ 254 (distd)

Hoare v Jessop [1965] EA 218 (folld)

Horrocks v Lowe [1974] 1 All ER 662 (refd)

Institute Of Commercial Management United Kingdom v New Straits Times Press (Malaysia) Bhd [1993] 1 MLJ 408 (distd)

International Times & Ors v Leong Ho Yuen [1980] 2 MLJ 86 (distd)

JB Jeyaretnam v Lee Kuan Yew [1979] 2 MLJ 282 (distd)

Janagi v Ong Boon Kiat [1971] 2 MLJ 196 (folld)

Kerry v Carter [1969] 1 WLR 1372 (refd)
Lee Kuan Yew v Derek Gwyn Davies & Ors [1990] 1 MLJ 390 (distd)
Lightbody v Gordon (1882) 9 R 934 (refd)
Luk Kai Lam v Sim Ai Leng [1978] 1 MLJ 214 (refd)
Mat Shah bin Mohamed & Anor v Foo Say Meng & Ors [1984] 1 MLJ 237 (refd)
Rajagopal v Rajan [1972] 1 MLJ 45 (distd)
Rasidin bin Partojo v Frederick Kiai [1976] 2 MLJ 214 (refd)
Renal Link (Kl) Sdn Bhd v Dato' Dr Harnam Singh [1997] 2 MLJ 373 (refd)
Robin v Sunrise Investments (Pte) Ltd & Anor [1991] 2 MLJ 517 (folld)
S Pakianathan v Jenni Ibrahim [1988] 2 MLJ 173 (distd)
Samar bte Mansor v Mustafa Kamarul Ariffin [1974] 2 MLJ 71 (refd)
Sandison v Malayan Times Ltd & Ors [1964] MLJ 332 (distd)
Sivalingam a/l Periasamy v Periasamy & Anor [1995] 3 MLJ 395 (refd)
Soong Ah Chow & Anor v Lai Kok Cheng [1986] 1 MLJ 42 (folld)
Syed Husin Ali v Syarikat Penchetakan Utusan Melayu Berhad & Anor [1973] 2 MLJ 56 (distd)
Tun Datuk Patinggi Haji Abdul-Rahman Ya'kub v Bre Sdn Bhd & Ors [1996] 1 MLJ 39 (distd)

Legislation referred to

Defamation Ordinance 1957 ss 7, 7(3)(b)
Evidence Act 1950 s 6
Stamp Act 1948 Sch 1 s 4
Statutory Declaration Act 1960 s 2, Sch 2
Rules of the Supreme Court 1957 O 19 r 22
Subordinate Courts Rules 1980 O 44 r 3(3)

SP Annamalai (*Annamalai & Co*) for the appellant.
N Shanmugam (*Syarikat Subbaiyah*) for the respondent.

VT Singham JC: **.** This is an appeal against the decision of the learned magistrate of the magistrate's court, Parit Buntar, who had on 16 August 1997 dismissed the appellant's claim for damages for libel against the respondent for lodging a police report on 1 August 1990 against the appellant, wherein the respondent is alleged to have falsely stated and (menyiarkan) published the contents of the report with bad faith or malice against the appellant. The police report vide Balai Polis Simpang Lima report No 552/90 is as follows:

> Pada hari ini 1/8/90 jam 8.30 pagi seorang guru yang bernama Anei a/p Lordusamy dari Sek Rendah Jenis Kebangsaan (T) Simpang 5 telah memberitahu kepada saya bahawa seorang pemuda India bernama Prabakhar a/l Muthu Thambipillai yang beralamat No 286, Jalan Selama, Bagan Serai, ugut saya dengan menyatakan dia akan melakukan sesuatu terhadap saya. Sebelum ini dia telah meminta nombor kereta dan nombor talipon dan alamat rumah saya. Melalui guru tersebut juga saya dapat tahu dia telah pergi ke rumah saya tetapi tidak berjumpa dengan saya. Oleh itu saya berasa risau sesuatu kejadian yang tidak diingini mungkin berlaku pada diri saya. Saya

melapurkan perkara ini kepada pihak polis. Sekian lapuran saya. (emphasis is by the court)

In this appeal, the appellant and the respondent will be referred to as the plaintiff and the defendant, respectively.

Statement of claim

By the statement of claim dated 9 October 1990, the plaintiff has, inter alia, pleaded that the words in the police report in the ordinary meaning meant and were understood to mean that the plaintiff had threatened to cause injuries to the defendant, in that the plaintiff intended to commit a criminal act.

As a result of the said police report, the plaintiff alleged that his reputation has been defamed and he has been put to public scandal, hatred, contempt and further, his reputation has been degraded in the opinion of reasonable thinking people and he has suffered loss and damage.

Consequent to the police report which the plaintiff alleged was made falsely and with malice by the defendant, the plaintiff has pleaded that he was summoned by the police and taken by two members of the police force from his house to the police station. At the police station, he was detained for about one hour and interrogated by the police and, consequently, he has suffered damage.

Amended statement of defence

On the other hand, by an amended statement of defence dated 20 November 1993, which was filed on 22 November 1993 after the plaintiff's case has been closed and after the commencement of the defence case, the defendant pleaded, inter alia, as follows:

(1) he admitted lodging the police report on 1 August 1990 but denied that it was stated falsely and published with malice as alleged by the plaintiff;

(2) the police report was made on an occasion of qualified privilege and raised particulars of the occasion of qualified privilege which, inter alia, states as follows:

   (a) before the defendant lodged the said police report, the defendant had been informed that the plaintiff was going to do something against him and that the plaintiff had asked for the number of the defendant's m/car, telephone and his house address from a teacher Anei a/p Lordusamy DW11 from the defendant's school;

   (b) the defendant felt that something (tidak diingini) was likely to happen to him and he complained of this matter to the police for his own safety as contained in his said police report ;

   (c) the defendant reported the matter to the police dutifully and without any malice against the plaintiff and with the belief that the contents of the police report were true;

(d) as a result of the abovementioned matters, the defendant owed a legal and/or social and moral duty to report the said matter to the police whose duty was to receive the police report;

(e) in the alternative, the defendant lodged the said police report in the reasonable and necessary protection of the defendant's own interest;

(f) the defendant denied that the contents of the police report generally gave the impression or meaning that the plaintiff had threatened the defendant and that the plaintiff would injure the defendant, ie the plaintiff intended to commit a criminal act. The defendant put the plaintiff to strict proof;

(g) the defendant denied that as a result of the said police report, the reputation of the plaintiff has been damaged and he has been put into public scandal, hatred and contempt and that the trustworthiness and reputation of the plaintiff has been defamed and further the plaintiff has been degraded in the opinion of reasonable thinking people as alleged.

It is important to observe at this stage that the amended statement of defence was filed pursuant to an order of court granted on 21 August 1993 for the said amendment and pursuant to a further order of court granted on 18 November 1993 for an extension of time to file the amended statement of defence.

However, before filing this action, the plaintiff by a notice of action dated 24 August 1990 through his solicitors M/s Annamalai & Co demanded an apology from the defendant and a retraction of the alleged false and wrongful report and thereafter to enter into negotiations to compensate the plaintiff adequately for all the loss and suffering caused to the plaintiff. As there was no response from the defendant to the said notice of action, the plaintiff sent a reminder dated 12 September 1990 through his solicitors M/s Annamalai & Co to the defendant giving him notice that the plaintiff was proceeding to file summons against the defendant. The defendant did not respond to both the said notice of action and the reminder.

Brief summary of the evidence

In order to have a better understanding of this case, it is necessary to summarise and set out briefly the background of the facts disclosed in the evidence which had caused the defendant to lodge the police report, which is as follows:

(1) The plaintiff is the son of one Dato Muthu Thambi Pillay (deceased), who was a well known and wealthy person who had lived in Bagan Serai for many years. The plaintiff is a licensed moneylender, a landowner who owns 38 houses which are rented out and undertakes sub-contract works. His family is apparently well known and respected in Bagan Serai. As admitted by the plaintiff, he had an affair with Cik Anei a/p Lordusamy ('DW11'), who was a temporary teacher in the school in which the defendant was a headmaster.

(2) The plaintiff admitted under cross-examination that he had an intimate relationship with DW11, and receipts of the hotels and lodgings were tendered as evidence to show where they had physically conducted their intimate relationship. The plaintiff has stated that this affair with DW11, which began in 1989 and lasted for about two years until sometime in July 1992, has since fizzled out and he was unaware of the whereabouts of DW11. The plaintiff denied that he had ever conveyed through DW11 of any threat to the defendant and that he was not sure if DW11 could have misrepresented of such threat by him to the defendant. According to the plaintiff, his intimate relationship with DW11 had ended.

(3) Sometime in July 1990, an anonymous letter dated 29 June 1990 was received by the State Education Department, which contained allegations of immoral conduct by DW11 after school hours. DW11 was informed of the said letter and she was distressed. The letter dated 29 June 1990, purportedly written by some parents of the students of the defendant's school, was sent to the Pengarah, Jabatan Pendidikan Perak Ipoh, and a copy to the Education Department, Parit Buntar, with attached photostat copies of cash receipts dated 16 February 1990 and 1 April 1990 from Campagne Hotel Night Club, Taiping, and contained allegations of immoral conduct against the said teacher DW11 of Sekolah Rendah Kebangsaan (Tamil) Simpang Lima, Parit Buntar, in which the defendant was the headmaster at the material time. The said letter dated 29 June 1990 ('IDD5') was considered an anonymous letter [surat layang] by the Education Department.

(4) On receipt of the said letter, the assistant education officer of the district of Kerian, Encik Yahaya bin Nuri ('DW2'), by a letter dated 6 July 1990, marked as exh D1, sent a copy of the said anonymous letter IDD5 to the defendant as headmaster of the said school in which DW11 was employed as a temporary teacher and instructed the defendant to investigate the complaint and to forward a complete report to the department on an urgent basis.

(5) On receipt of the instructions from DW2, through exh D1, the defendant carried out an investigation and interviewed DW11. Subsequently, by letter dated 9 July 1990, marked as exh D2, the defendant forwarded his report to the education officer of the district of Kerian, Parit Buntar. In the meantime and before preparing his investigation report, the defendant had questioned DW11 about this letter and she is alleged to have informed the defendant that the author of the said anonymous letter was her estranged lover, the plaintiff, who had threatened her that he will do anything possible to terminate her services in the said school. She had also informed the defendant in late July 1990 that the plaintiff had been making inquiries from her about the whereabouts of the defendant's house, his m/car and telephone number. DW11 had also informed the defendant that the plaintiff was contemplating to do something to the defendant for not having terminated her employment contract.

(6) The contents of the defendant's reply, exh D2, reads as follows:

SEKOLAH RENDAH JENIS KEBANGSAAN (TAMIL)
SIMPANG LIMA, 34200 PARIT BUNTAR, PERAK

Kod Sekolah: ABD 3060
Bil (1) Dlm SRJK (T) SPG LIMA
Tarikh: 9 Julai 1990

Tuan Pegawai Pendidikan Daerah,
Pejabat Pendidikan Daerah Kerian,
No. 58, Jalan Stesen,
Parit Buntar,
Perak

Tuan,
Per: Laporan Serta Aduan Berhubung
Dengan Seorang Guru Sementara
Cik Anei d/o Lordusamy

Merujuk kepada surat tuan bil (24) dlm PPD KRN/01/09/015(R) Jld 111 bertarikh 6 Julai 1990 mengenai perkara tersebut diatas saya telah siasat Cik Anei d/o Lordusamy seorang guru sementara di sekolah ini dan didapati bahawa dia tidak mengaku dia seorang pelacur dan mengaku butir-butir di surat aduan tersebut tidak benar tetapi mengaku Cik Anei pernah bermalam dengan kekasihnya yang bernama Prabakaran a/l Muthu Thambipillai di beberapa hotel di Taiping termasuk Chempagne Hotel & Night Clubs pada 16 Feb 1990 dan 1 April 1990. Apabila ditanya sama ada Cik Anei kenal siapa yang menulis dan menghantar surat aduan tersebut ke Jabatan Pendidikan Negeri Cik Anei mengaku bahawa kekasihnya Prabakaran a/l Muthu Thambipillai yang menulis dan menghantarkan ke JPN. Apabila ditanya bagaimana Cik Anei tahu Prabakaran yang tulis surat aduan tersebut Cik Anei menjawab bahawa dia kenal tulisan yang terdapat ditandatangan yang terdapat di surat aduan tersebut, resit-resit yang dikepilkan dengan surat aduan dan Prabakaran sendiri telah memberi amaran kepadanya akan membuat sesuatu untuk menamatkan perkhidmatannya sebagai guru dan tidak ada orang lain yang boleh menyimpan resit-resit hotel tersebut melainkan kekasihnya yang pernah bermalam di hotel tersebut dengannya.

Apabila ditanya sebab-sebab Prabakaran a/l Muthu Thambipillai sanggup berbuat demikian Cik Anei telah memberitahu bahawa mereka (Cik Anei dan Prabakaran) pernah bermalam di beberapa hotel di Taiping dan lain-lain tempat semenjak tiga tahun dan apabila Cik Anei menawarkan diri untuk berkahwin dengan Prabakaran tetapi Prabakaran tidak setuju berkahwin dengannya dengan alasan Cik Anei beragama Kristian dan Prabakaran beragama Hindu. Dan apabila ini berlaku Cik Anei enggan bercampur dengan kekasihnya dan satu bertengkaran berlaku dan ini menyebabkan kekasihnya berdendam dan pernah mengancam untuk membuat sesuatu bagi menamatkan perkhidmatannya sebagai guru di sekolah ini.

Saya telah menyiasat melalui guru-guru yang kenal Cik Anei mengenai kelakuannya saya dapat difahamkan guru-guru tersebut pernah berjumpa Cik Anei dengan Prabakaran.

Sekian terima kasih.

Saya yang menurut perintah,
tt

.....

Salam bin Seran
Guru Besar,
SRJK (T) Simpang Lima,
34200 Parit Buntar

(7) Encik Khalid Shah bin Jamaluddin, the State Deputy Director of Education Perak, Ipoh ('DW4'), through DW2, instructed the defendant to advise DW11. The defendant then issued a warning letter dated 31 July 1990, marked as exh D3, to DW11 advising her to conduct herself well in future and that if she continued to commit such immoral conduct, disciplinary action would be taken against her. The said letter, exh D3, reads as follows:

SEKOLAH RENDAH JENIS KEBANGSAAN (TAMIL)
SIMPANG LIMA, 34200 PARIT BUNTAR, PERAK

Kod Sekolah: ABD 3060
Bil (6) Dlm SRJK (T) SPG L C/13
Tarikh: 31 Julai 1990

Cik Anei a/p Lordusamy,
(No Fail (Per) 74981)
SRJK (T) Simpang Lima,
34200 Parit Buntar,
Perak Darul Ridzuan

Cik,
Perkara: Surat Teguran
Cik Anei a/p Lordusamy (F/Per:74981)

Adalah saya dengan dukacitanya ingin memberitahu cikgu bahawa pihak Jabatan Pendidikan Negeri Perak telah menerima sepucuk surat aduan mengenai kelakuan cikgu yang kurang baik.

Hasil siasatan yang dibuat oleh pihak sekolah dan dari keterangan yang diberi oleh cikgu sendiri menunjukkan bahawa cikgu sebenarnya telah berkelakuan kurang baik.

Saya bagi pihak sekolah ini berasa kesal dengan perbuatan cikgu yang boleh mencemarkan nama baik sekolah ini. Oleh yang demikian saya melalui surat ini memberi teguran keras terhadap kelakuan cikgu tersebut dan berharap cikgu akan insaf dan mengubah kelakuan cikgu demi menjaga imej diri dan sekolah. Sekiranya cikgu mengulangi perbuatan tersebut tindakan tatatertib akan diambil terhadap cikgu.

Sekian dimaklumkan.

BERKHIDMAT UNTUK NEGARA

Saya yang menurut perintah,
tt

.....
SALAM BIN SERAN
sk 1. Tuan Pengarah Pendidikan Negeri Perak
2. Tuan Pegawai Pendidikan Daerah Kerian.

(8) DW11 had, on 1 August 1990, once again reiterated the threat of the plaintiff against the defendant to the defendant in the presence of two fellow teachers, namely, T Kunasegaran ('DW7') and D Nathan

('DW8'). DW11 informed the defendant that the plaintiff had actually located the defendant's house and was going to see him and that he had been to the defendant's house, but the defendant was not there. Quite naturally, the defendant on hearing from DW11 the threat of the plaintiff became worried and frightened and reported the matter to his superior DW4, who then instructed him to lodge a police report. Accordingly, the defendant lodged the said police report on 1 August 1990.

(9) On receipt of the notice of action dated 24 August 1990 from the plaintiff's solicitors of the intended action for defamation against the defendant in respect of the defendant's police report, the defendant showed it to DW11 in the presence of DW7 and DW8. DW11 in turn agreed to swear a statutory declaration dated 29 August 1990, exh D4, being the first statutory declaration to confirm that she had in fact informed the defendant of the threat made by the plaintiff against the defendant. DW11 signed this statutory declaration dated 29 August 1990, marked as exh D4, and has since apparently disappeared and only reappeared in court during the defence case on 21 January 1995, after ten witnesses for the defence had testified.

(10) However, during cross-examination of the defendant by the plaintiff's counsel, he was shown another statutory declaration dated 5 July 1991 also signed by DW11, marked as exh P10, being the second statutory declaration. In this second statutory declaration, she had denied participating in the police report lodged by the defendant against the plaintiff and alleged that she was compelled to sign the first statutory declaration dated 29 August 1990 (exh D4) and that she did not know the contents of the first statutory declaration (exh D4). By the second statutory declaration dated 5 July 1991 (exh P10), she has stated that it was the defendant himself who had created the first statutory declaration dated 29 August 1990 (exh D4).

(11) On the other hand, the defendant has denied the averments contained in the second statutory declaration and maintained that he had acted and lodged the police report on what was told to him by DW11, who had accompanied him to the police station and that he had no axe to grind or had any grudges against the plaintiff.

(12) The defence witnesses, DW7 and DW8, respectively, corroborated the defendant's evidence of the conversation that transpired between DW11 and the defendant in regard to the plaintiff who had threatened the defendant as informed by DW11 and both the witnesses DW7 and DW8 confirmed that they were present when DW11 made the first statutory ddeclaration and that she had made it voluntarily.

(13) The last witness for the defence was DW11, who admitted having an intimate relationship with the plaintiff and that she was aware of this anonymous letter IDD5. She, however, denied that she had knowledge as to the maker of the said letter. She had also testified that she was compelled to sign the first statutory declaration by the defendant, DW7 and DW8, and she had no knowledge as to the

contents of the first statutory declaration and that she was refused sight of it by the defendant. DW11, however, admitted being present at the police station when the police report was lodged by the defendant, but denied knowledge as to the contents of the police report. She also denied being a party to the police report. On the other hand, DW7 has confirmed that DW11 had followed the defendant and himself to the police station and she was seated with the defendant in front of the police officer who took down the said police report.

(14) As the hearing continued, DW11 testified that there was never any falling out between herself and the plaintiff, and she maintained that their relationship was still on, despite the fact that the plaintiff has stated otherwise in his evidence that DW11 was no longer his girlfriend, that she has not been in touch with him since July 1992 and there were no calls or correspondence from her after that period.

(15) On re-examination, DW11 testified that she made the second statutory declaration dated 5 July 1991 (exh P10) because she was not sure of her first statutory declaration (exh D4) and for the reason that the first statutory declaration may have been manipulated by the defendant against her.

Having traced and summarised briefly the history of this case from the evidence adduced at the trial, this court wishes to proceed to consider the findings made by the learned magistrate, the function of this appellate court, the law on defamation, the defence of qualified privilege and the reply, if any, of express malice and whether the learned magistrate has made a correct decision when he dismissed the plaintiff's claim. In *Samar bte Mansor v Mustafa Kamarul Ariffin* [1974] 2 MLJ 71, by a majority judgment, the Federal Court chaired by His Lordship Suffian LP said on the same page:

> The learned trial judge was concerned to determine who was telling the truth, but we sitting in an appellate court are concerned to determine not so much the truth as whether there had been error on the part of the trial judge.

Function of the appellate court on the findings of fact made by the trial court

It is settled law that an appellate court will generally not disturb or interfere with the findings of fact made by a trial court, unless that finding is not supported by evidence or the decision is against the weight of the evidence or there was no proper judicial evaluation of the evidence or there was misdirection in law or the trial court has fundamentally misdirected itself.

In *Commercial Union Assurance (M) Sdn Bhd v Ng Chek Hung and another appeal* [1997] 2 MLJ 465, his Lordship Gopal Sri Ram JCA referred to the passage formulated by Lord Shaw in his speech in *Clarke v Edinburgh Tramways Co* 1919 SC (HL) 35 at p 36:

> When a judge hears and sees witnesses and makes a conclusion or inference with regard to what on balance is the weight of their evidence, that judgment is entitled to great respect, and that quite irrespective of whether the judge makes any observations with regard to credibility or not. I can of course quite

> understand a Court of Appeal that says that it will not interfere in a case in which the judge has announced as part of his judgment that he believes one set of witnesses, having seen them and heard them, and does not believe another. But that is not the ordinary case of a cause in a court of justice. In courts of justice in the ordinary case things are much more evenly divided; witnesses without any conscious bias towards a conclusion may have in their demeanour, in their manner, in their hesitation, in the nuance of their expressions, in even the turns of the eyelid, left an impression upon the man who saw and heard them which can never be reproduced in the printed page. What in such circumstances, thus phychologically put, is the duty of an Appellate Court? In my opinion, the duty of an Appellate Court in those circumstances is for each judge of it to put to himself, as I now do in this case, the question, am I — who sit here without those advantages, sometimes broad and sometimes subtle, which are the privilege of the judge who heard and tried the case — in a position, not having those privileges, to come to a clear conclusion that the judge who had them was plainly wrong? If I cannot be satisfied in my own mind that the judge with those privileges was plainly wrong, then it appears to me to be my duty to defer to his judgment.

In *Mat Shah bin Mohamed & Anor v Foo Say Meng & Ors* [1984] 1 MLJ 237, his Lordship Wan Sulaiman FJ for the Federal Court said of the trial court judge as follows (at p 243):

> He had seen and heard all the witnesses and studied all the documents before him. He believed and accepted the evidence adduced by the respondents. He held that the appellants had not discharged the onus of proof. Therefore, he was not satisfied that the appellants had established their claim as the rightful owner of the two licences. He therefore declined to make the declaration prayed for and dismissed the claim with costs. He also dismissed the respondents' counter-claim with costs. We do not consider that an appellate court has any reason to interfere in a case of such nature.

In the case of *Renal Link (KL) Sdn Bhd v Dato' Dr Harnam Singh* [1997] 2 MLJ 373, his Lordship Gopal Sri Ram JCA said, inter alia, at p 379:

> Unless we, as a Court of Appeal, are convinced that there was no judicial appreciation of evidence by the trier of fact, or that the audio-visual advantage reserved to a trial judge had been missed or that the findings made do not accord with the probabilities of the case taken as a whole, it will not be open to us to intervene and upset the findings made by a trial judge.

In *Rasidin bin Partorjo v Frederick Kiai* [1976] 2 MLJ 214, His Lordship Wan Sulaiman FJ, in delivering the judgment of the Federal Court, said in the first holding:

> It would be wrong for the appellate court which had not seen or heard the witnesses to substitute its own finding of fact for that of the learned trial judge.

On the other hand, it is also settled law that the appellate court will readily interfere with the findings of fact of a trial court if the trial court which had the advantage of having seen and heard the evidence of the witnesses had so fundamentally misdirected itself or there was insufficient judicial appreciation or the finding of a specific fact was not dependent upon the credibility of witnesses but upon inferences drawn from other facts (see *Sivalingam a/l Periasamy v Periasamy & Anor* [1995] 3 MLJ 395, *Kerry v*

Carter [1969] 1 WLR 1372, *China Airlines Ltd v Maltran Air Corp Sdn Bhd (formerly known as Maltran Air Services Corp Sdn Bhd) and another appeal* [1996] 2 MLJ 517).

In *China Airlines Ltd v Maltran Air Corp Sdn Bhd (formerly known as Maltran Air Services Corp Sdn Bhd) and another appeal*, the present Mohamed Dzaiddin Chief Justice for the Federal Court at p 528 referred the passage formulated by Lord Reid in *Benmax v Austin Motor Co Ltd* [1955] 1 All ER 326 whereby his Lordship stated at p 329:

> But in cases where there is no question of the credibility or reliability of any witness, and in cases where the point in dispute is the proper inference to be drawn from proved facts, an Appeal Court is generally in as good position to evaluate the evidence as the trial judge, and ought not to shrink from that task, though it ought, of course, to give weight to his opinion.

In *Re AB Ltd* [1956] MLJ 197, His Lordship Whyatt CJ said at p 200:

> … an Appellate Court may allow an appeal from a determination on a question of fact if it appears to the Appellate Court that a misconception of law has been responsible for the determination. All these authorities are reviewed in a very recent case, *Edwards (Inspector of Taxes) v Bairstow* in which Lord Radcliffe delivered, as usual, if I may respectfully say so, a brilliantly clear judgment in which he said:
>
> > 'It may be the facts found are such that no person acting judicially and properly instructed as to the relevant law could have come to the determination under appeal. In these circumstances … the court must intervene. I do not think that it matters whether the state of affairs is described as one in which there is no evidence to support the determination, or as one in which the evidence is inconsistent with, and contradictory of, the determination, or as one in which the true and only reasonable conclusion contradicts the determination. Rightly understood, each phrase propounds the same test. For my part, I prefer the last of the three.'

Having gone through the law on the function of an appellate court, it is now important to consider some of the relevant evidence which was adduced at the trial as contained in this record of appeal, encl 9.

According to the plaintiff, he was questioned by the police, namely, Insp Eusoffe ('PW2'), at the police station, Bagan Serai, for about one hour and that the inspector raised his voice, whereas PW2, the plaintiff's own witness, testified that he had questioned the plaintiff for only about 10–15 minutes in respect of the police report lodged by the defendant. PW2 testified that the plaintiff informed him that he did not have any misunderstanding with the defendant and his misunderstanding was only with DW11, which was personal in nature. PW2 further testified that he did not detain the plaintiff and that he called the plaintiff because his name was mentioned in the police report. The defendant was also not charged with any false report and there was no action taken against the defendant.

This court finds that PW2, the plaintiff's own witness, has in fact contradicted the plaintiff's evidence which shows that the plaintiff was only questioned for only about 10 –15 minutes and not detained for one hour as

testified by the plaintiff. It is also noted that it was not put to PW2 that the plaintiff was arrested and/or detained for about one hour and that he had raised his voice as alleged by the plaintiff. In fact, PW2 has testified that he had merely instructed his policeman to call for the plaintiff and this evidence was not challenged or contradicted. Also, there is no evidence that the plaintiff had ever complained to PW2 of his unhappiness as to how he was brought to the police station. There is also no evidence that the plaintiff had ever complained to PW2 as to why he was arrested, if at all he was arrested. In fact, PW2 has testified that he had merely instructed his policeman to call for the plaintiff and this evidence was also not challenged.

The defendant's evidence that DW11 was with him when he lodged the police report at the police station was confirmed by L/Cpl Ramli ('DW3'), who is an independent witness and further supported by DW7 and DW8, and this was also not challenged by the plaintiff. DW3 had also testified that DW11 could hear the defendant when he lodged the police report as she was near him. DW3 had testified that he read the police report to the defendant and then to DW11 and DW11 did not object to the contents of the police report. All this evidence was not challenged by the plaintiff.

This court is of the view that just because DW11 has denied certain evidence that was given on behalf of the defendant as to her role in respect of the police report does not mean that the entire case of the defendant has failed because the trial court could still look at the evidence of the other witnesses for the defence, which includes the defendant's evidence which the learned magistrate believed and found to have been corroborated by both DW7 and DW8, and this court has no reason to disturb that finding of fact.

It cannot be denied that the police had acted on their own initiative in calling the plaintiff for questioning, which had lasted only for 10–15 minutes and this part of the evidence of the plaintiff's own witness PW2 remains unchallenged. This court finds that the defendant had just cause for making his police report and he did not act with malice or make a false report. The defendant was worried and frightened, which is a natural feeling and expected of any reasonable minded person that something would happen to him after he was told by DW11 of the threat and the intended harm by the plaintiff and that he had merely passed on his fears to the police, and the police had acted independently. This court finds that the defendant was not prompted by malice against the plaintiff when he lodged the police report on 1 August 1990 and there was absolutely no basis for him to falsely invent the story of the plaintiff's threat against him and that his predominant desire was purely to place his safety in the hands of the police. The defendant honestly believed in the pathetic story that was told to him by DW11 of her past relationship with the plaintiff at the time when she had fallen out with the plaintiff.

On the facts and circumstances of this case, this court is of the view that the police report lodged by the defendant was made with an honest belief that he was threatened with harm by the plaintiff as told to him by DW11. The contents of the police report, when looked on its totality, does not show

any bad faith or malice on the part of the defendant and this is confirmed by the plaintiff's evidence. He has testified that he does not know why the defendant has lodged the police report against him, he does not know what DW11 told the defendant about him, he does not know the defendant at all, there was no problem between the defendant and himself and, as such, there could be no reason for the defendant to have lodged the police report against him. In fact, even on re-examination, the plaintiff had still maintained that he does not know the defendant at all and that he does not know why he made the police report.

On the plaintiff's own evidence itself, this court finds there is no basis for the trial court, or for that matter, even this court to draw any inference that the defendant's police report was actuated with malice. In *Caswell v Powell Duffryn Associated Collieries Ltd* [1940] AC 152, Lord Wright said at pp 169–170:

> Inference must be carefully distinguished from conjecture or speculation. There can be no inference unless there are objective facts from which to infer the other facts which it is sought to establish. In some cases the other facts can be inferred with as such practical certainty as if they had been actually observed. In other cases the inference does not go beyond reasonable probability. But if there are no positive proved facts from which the inference can be made, the method of inference fails and what is left is mere speculation or conjecture.

The word malice in general defamation use means 'any ill will, spite or some wrong which can defeat a defence of qualified privilege' (see *Gatley on Libel and Slander* (9th Ed)). Malice also means making use of the occasion for some indirect purpose (per Lord Herseheel in *Browne v Dunn* (1893) 6 R 67 at p 72). In this case, there was no evidence that the defendant made use of the occasion for any indirect purpose other than for a lawful purpose to secure his safety. There is also no evidence that the defendant was actuated by some indirect motive or connected with the privilege or had made use of the occasion or was under the influence of some indirect motive (see *Hoare v Jessop* [1965] EA 218 at p 222).

This court finds that the defendant had acted in accordance with the sense of duty and in bona fide protection of his own legitimate interest. In fact, he owed a duty whether it is labelled as social, moral or legal duty to draw the attention of the police to seek redress for his grievance, namely, the threat of the plaintiff which he was informed of by DW11 and confirmed by DW7 and DW8 that DW11 had, in fact, informed the defendant of the intended harm by the plaintiff. This court is of the view that it will not be in the best interests of society if people are threatened with defamation suits even if a person has honest belief that his life has been threatened with some harm and he seeks the protection of the police by lodging a police report to seek redress for his grievance and for his safety.

Lord Atkinson in *Adam v Ward* [1917] AC 309 said at p 334:

> [A] privileged occasion is, in reference to qualified privilege, an occasion where the person who makes a communication has an interest or a duty, legal, social or moral, to make it to the person to whom it is made, and the person

to whom it is so made has a corresponding interest or duty to receive it. This reciprocity is essential.

In *Abdul Rahman Talib v Seenivasagam & Anor* [1965] MLJ 142, His Lordship Hepworth J said at p 154:

> It is the duty of everyone, in the interest of public efficiency and good order, to bring any misconduct or neglect of duty on the part of a public officer or employee, or any public abuse, to the notice of the proper authority for investigation. Any complaint or information as to such misconduct, neglect of duty, or abuse, though volunteered, is privileged, provided it is made in good faith to the person or body who has the power or duty to remove, punish or reprimand the offender, or merely to inquire into the subject-matter of the complaint. Any citizen who *bona fide* believes that wrong has been done has the right and duty to bring the alleged fact before the proper authority for investigation. In doing so he exercises an undoubted privilege which it is not in the public interest to penalise.
>
> But no privilege will attach to any such complaint or information if addressed to a person or body having no jurisdiction or control over the person whose conduct is impugned nor any power or duty to grant redress for, or inquire into, the abuse complained of. No protection can be afforded to a person who wrongly assumes the facts which constitute a privileged occasion. So no privilege will attach to a complaint as to the conduct of a public official if it is given out for publication in the newspapers in advance of its delivery to the proper authority for investigation.

In the instant case, this court finds that the police report was made pursuant to an interest and a legal duty on the part of the defendant, and the police who received the police report had a corresponding interest and duty to receive it. All that the defendant did, on the facts and circumstances in this case, was to bring to the notice of the police what was told to him by DW11 and for his own safety. In fact, the defendant has a right and duty to bring the threat as contained in the police report to the notice of the proper authorities, in this case, the police and the type of action which the police chose to take on the said report was beyond the control of the defendant. On the facts and circumstances in this case, this court finds that the defence of qualified privilege was in favour of the defendant. Consequently, on the facts of this particular case and on the balance of probabilities, the plaintiff had not succeeded in showing malice against the defendant when he lodged the police report.

Delay in filing the amended statement of defence

The complaint by learned counsel for the plaintiff that the amended statement of defence dated 20 November 1993, which included the defence of qualified privilege, was only filed after the close of the plaintiff's case was not open to be raised for the first time on appeal. The reasons are as follows:

(1) the application by the defendant's counsel on 21 August 1993 to amend the statement of defence was consented to without objection by the plaintiff's counsel. Accordingly, an order in terms of the

application to amend the statement of defence was granted by the learned magistrate on 21 August 1993;

(2) the application by the defendant's counsel on 18 November 1993 to extend the date of filing the amended statement of defence was also not objected to by the plaintiff's counsel and an order was granted by the court to extend the time to file the amended statement of defence, which was in fact filed on 22 November 1993;

(3) there was no application by the plaintiff's counsel to reopen the plaintiff's case after the amended statement of defence was filed, either with a view to raise any rebuttal evidence on the issue of qualified privilege or with a view to adduce any evidence on the issue of malice or to serve a reply and, if it was done, it could have perhaps defeated the defence of qualified privilege depending on what the rebuttal evidence or reply would have been, but this exercise was not carried out by the plaintiff;

(4) in addition to the non-compliance with the abovementioned formalities, the plaintiff himself in his own evidence admitted that he did not know the defendant, he did not know why the defendant lodged the police report and that there was no reason for the defendant to lodge the police report and he did not know what DW11 had told the defendant about himself;

(5) had the plaintiff objected to the defendant's application to amend the statement of defence and/or to extend the time for filing the amended statement of defence on the ground that the application to amend the statement of defence was made after the plaintiff had closed his case and that it was prejudicial to the plaintiff, this complaint might, perhaps, have had some persuasive consideration at this appeal;

(6) however, having raised no objection to the application for the amendment of the statement of defence and for an extension of time to file the amended statement of defence at the lower court, the plaintiff cannot now attempt to raise this issue as a ground to persuade this court to reverse the decision of the learned magistrate, which clearly shows, to borrow the expression used by His Lordship YA Tan Sri Mohtar bin Abdullah FJ in *Allied Capital Sdn Bhd v Mohamed Latiff Shah Mohd and another application* [2001] 2 MLJ 305, that it 'smacks of an afterthought';

(7) in the absence of any objection raised on behalf of the plaintiff at the lower court on the amendment to the statement of defence, this court is unable to accept the complaint raised now for the first time on appeal on behalf of the plaintiff. A party cannot be allowed to lie by until the case comes up for hearing before the Court of Appeal and then raise his complaint for the first time of the amendment, when this opportunity to object was available to the party at the trial.

In the circumstances, this ground which was raised by the plaintiff's counsel merits no consideration and is rejected.

Order 44 r 3(3) of the Subordinate Courts Rules 1980

The defendant's counsel argued that the plaintiff ought to have served a reply with particulars of express malice to the amended statement of defence, which had raised the defence of qualified privilege as required under O 44 r 3(3) of the Subordinate Courts Rules 1980 ('SCR'). In reply, the plaintiff's counsel argued that it was not necessary for the plaintiff to serve a reply giving particulars of the facts and matters of the malice as the plaintiff had already raised malice in the statement of claim.

This court is of the view that merely having pleaded malice in the statement of claim will not be sufficient to comply with the mandatory requirement of O 44 r 3(3) of the SCR.

Order 44 r 3 of the SCR reads as follows:

> (1) Where in an action for libel or slander the plaintiff alleges that the words or matters complained of were used in a defamatory sense other than their ordinary meaning, he must give particulars of the facts and matters on which he relies in support of such sense.
>
> (2) Where in an action for libel or slander the defendant alleges that, in so far as the words complained of consist of statements of fact, they are true in substance and in fact, and in so far as they consist of expressions of opinion, they are fair comment on a matter of public interest, or pleads to the like effect, he must give particulars stating which of the words complained of he alleges are statements of fact and of the facts and matters he relies on in support of the allegation that the words are true.
>
> (3) Where in an action for libel or slander the plaintiff alleges that the defendant maliciously published the words or matters complained of, he need not in his statement of claim give particulars of the facts on which he relies in support of the allegation of malice, but if the defendant pleads that any of those words or matters are fair comment on a matter of public interest or were published upon a privileged occasion and the plaintiff intends to allege that the defendant was actuated by malice, he must serve a reply giving particulars of the facts and matters from which the malice is to be inferred.
>
> (4) This rule shall apply in relation to a counterclaim for libel or slander as if the party making the counterclaim were the plaintiff and the party against whom it is made the defendant.

This court is of the view that where the plaintiff wishes to rely on express malice on the part of the defendant in order to defeat the plea of qualified privilege, he will have to plead to this effect and give particulars of facts and matters from which he alleges the malice is to be inferred and this should be done by way of reply and not in the statement of claim (see *Gatley on Libel and Slander* (9th Ed) and 28 *Halsbury's Laws of England* para 150 (4th Ed)).

However, the plaintiff's counsel relied on *Luk Kai Lam v Sim Ai Leng* [1978] 1 MLJ 214 to support his argument that the plaintiff was not required to serve a reply as malice had already been pleaded in the statement of claim. In that case, there was evidence from the plaintiff that the words uttered by the defendant and found to be defamatory were made out of spite and the defendant did not testify in court about the matter.

Consequently, His Lordship Lee Hun Hoe CJ (Borneo), speaking for the Federal Court, found that the learned judge had held those words which were spoken by the defendant were of malice and the defence of qualified privilege failed even though there was no reply with particulars of the malice filed by the plaintiff on the facts in that case.

Further, under O 19 r 22 of the Rules of the Supreme Court 1957 ('RSC'), which was referred to in *Luk*'s case, there was no mandatory requirement to deliver a reply giving particulars of the facts and matters from which malice is to be inferred. Therefore, His Lordship Lee Hun Hoe CJ (Borneo), having considered O 19 r 22 of the RSC, held that the plaintiff did not need to specifically allege malice in his reply if he had already alleged malice in the statement of claim and the proviso to O 19 r 22 of the SCR did not come into play. Nevertheless, for the purpose of clarity and to distinguish both the rules, it is useful to refer to the express provision of O 19 r 22 of the RSC, which reads as follows:

> Provided that where in an action for libel or slander the defendant pleads that any of the words or matters complained of are fair comment on a matter of public interest or were published upon a privileged occasion, the plaintiff shall, if he intends to allege that the defendant was actuated by express malice, deliver a reply giving particulars of the facts and matters from which such malice is to be inferred.

Whereas O 44 r 3(3) of the SCR expressly states that '… the defendant must serve a reply giving particulars of the facts and matters from which the malice is to be inferred.' The crux of the issue is, whether it is mandatory for the plaintiff to serve a reply under O 44 r 3(3) of the SCR if the plaintiff intends to allege that the defendant was actuated by express malice when compared to the proviso in O 19 r 22 of the RSC or is the plaintiff allowed to rely on its statement of claim. This court is of the view that in order to determine this issue, both the word 'shall' in O 19 r 22 of the RSC and the word 'must' in O 44 r 3(3) of the SCR must be considered. The use of the word 'shall' in O 19 r 22 of the RSC is merely directory and implies some discretion (see *Soong Ah Chow & Anor v Lai Kok Cheng* [1986] 1 MLJ 42), whereas the use of the word 'must' instead of 'shall' in O 44 r 3(3) of the SCR will itself be sufficient to hold the expression to be mandatory.

In the circumstances, this court is of the view that in order for the plaintiff to rely on express malice, he 'must serve a reply giving particulars of the facts and matters from which the malice is to be inferred.' In *Abdul Rahman Talib v Seenivasagam & Anor* [1965] MLJ 142, His Lordship Hepworth J said at pp 156–157:

> Qualified privilege can be rebutted by proof of express malice, that is malice other than that to be implied from the defamatory words themselves. Malice may be inferred either from the terms of the communication itself, eg where the language is unnecessarily strong, or from any facts which show that the defendant in publishing the words complained of was actuated by spite or by some indirect motive.
>
> Actual malice does not necessarily mean personal spite or ill-will. Malice in the actual sense may exist, even though there be no spite or desire for

vengeance in the ordinary sense. Any indirect motive other than a sense of duty is what the law calls malice. Malice means making use of the occasion for some indirect purpose. If the occasion is privileged it is so for some reason, and the defendant is only entitled to the protection of the privilege if he uses the occasion for that reason. He is not entitled to the protection if he uses the occasion not for the reason which makes the occasion privileged, but for an indirect or wrong motive — an improper motive, some motive other than that which alone would excuse him — some indirect motive not connected with the privilege.

The existence of indirect motive or malice may be proved by extrinsic evidence, that is, something outside the libel itself, eg by expressions of personal spite or ill-will towards the plaintiff or by threats made against him, or by showing that the defendant had some previous quarrel with the plaintiff, or brought unsuccessful actions against him. So anything that shows that the plaintiff and the defendant lived on bad terms may bear on the issue of malice.

Where the plaintiff must prove express malice, if he can show any example of spite or indirect motive, whether before or after the publication, he would establish his case, provided that the examples given are so connected with the state of mind of the defendant as to lead to the conclusion that he was malicious at the date when the libel was published. No doubt the evidence must be more consistent with malice than with an honest mind, but this does not mean that all the evidence adduced of malice towards the plaintiff on the part of the defendant must be set against such evidence of a favourable attitude towards him as has been given. On the contrary, each piece of evidence must be regarded separately and even if there are a number of instances where a favourable attitude is shown, the case tending to establish malice would be sufficient evidence on which to find for the plaintiff. Nevertheless each particular instance of alleged malice must be carefully analysed, and if the result is to leave the mind in doubt then that piece of evidence is valueless as an instance of malice, whether it stands alone or is combined with a number of similar instances.

But malice is not only provable by extrinsic evidence: it may be intrinsic, that is, to be inferred from the terms of the alleged libel itself. It may be that the language used in a libel, though under other circumstances justifiable, may be so much too violent for the occasion and circumstances as to form strong evidence of malice, and that an inference of actual malice may be drawn from its use.

In *Janagi v Ong Boon Kiat* [1971] 2 MLJ 196, His Lordship Sharma J (as His Lordship then was) observed that:

A statement of claim and the defence (together with the reply, if any) constitute the pleadings in a civil action. It is on the examination of the pleadings that the court notices the differences which exist between the contentions of the parties to the action. In other words the matters on which the parties are at issue are determinable by an examination of the pleadings. An issue arises when a material proposition of law or fact is affirmed by one party and denied by the other. The court is not entitled to decide a suit on a matter on which no issue has been raised by the parties. It is not the duty of the court to make out a case for one of the parties when the party concerned does not raise or wish to raise the point. In disposing of a suit or matter involving a disputed question of fact it is not proper for the court to displace the case made by a party in its pleadings and give effect to an entirely new case

which the party had not made out in its own pleadings. The trial of a suit should be confined to the pleas on which the parties are at variance.

Therefore, it is the view of this court that it was a mandatory requirement on the part of the plaintiff to have served a reply giving particulars of the facts and matters from which the malice is to be inferred as required under O 44 r 3(3) SCR. However, since the plaintiff had failed to serve a reply pleading express malice as required under O 44 r 3(3) SCR, he cannot be allowed to rely on express malice without having served the reply to defeat the defence of qualified privilege, as only the reply will form the pleadings in the civil suit.

Admissibility of documents

As to the plaintiff's counsel's complaint that the documents produced on behalf of the defendant from pp 197 to 204, namely, exhs D1 to D4 of the record of appeal, were only produced during the hearing of the defendant's case, this court finds that this complaint was not specifically raised in the submissions before the learned magistrate to the effect that no weight or less weight should be given to those documents, but was only raised for the first time on appeal. As observed above, this point should have been raised during the submissions at the trial and it is too late to raise it now. In any event, exh D1 (the letter dated 6 July 1990 with the enclosure of the anonymous letter IDD5 from DW2, the assistant education officer of the district of Kerian, to the defendant with instructions for the defendant to carry out an investigation), exh D2 (the letter dated 9 July 1990 from the defendant to the district education officer containing the report of his investigation) and exh D3 (the letter dated 31 July 1990 from the defendant to DW11 giving her warning to conduct herself well) are clearly admissible to show the respective role and functions of DW2 and DW4, the sequence of events which made DW11 inform the defendant of the plaintiff's threat against the defendant and to corroborate the oral evidence of the defendant. It is too late to raise this point now and it is not a good ground, and the evidence has been correctly held to be admissible by the learned magistrate.

As for the document marked exh D4, which the plaintiff's counsel complained should not have been admitted and marked as an exhibit, this court is of the view that, firstly, if exh P10 is allowed to be accepted as evidence for the plaintiff, there is no reason why the defence exh D4 should not be accepted as evidence for the defendant. DW11 did not deny her signature in exh D4, but that she did not sign it voluntarily; secondly, if exh D4 should not have been accepted as a statutory declaration as contended by the plaintiff's counsel, then certainly exh P10 cannot also be accepted as a statutory declaration for the reason being that exh P10 did not comply with the Statutory Form in Sch 2 pursuant to s 2 of the Statutory Declaration Act 1960 and exh P10 was also not stamped as required under s 4 of the First Schedule of the Stamp Act 1948 — 'What is good for the goose is also good for the gander …'

However, if both exhs D4 and P10 are excluded as evidence for non-compliance with the Statutory Declaration Act 1960 and the Stamp Act

1948, respectively, there are still other evidence to support the defence of qualified privilege. Further, even if exh D4 is excluded and exh P10 is allowed to remain as evidence, it still does not weaken the defence case. On the other hand, if both exhs D4 and P10 cannot be accepted as statutory declarations, those two documents could still be accepted as letters written by DW11, as she has admitted signing both exhs D4 and P10. In the circumstances, this court is of the view that is is a matter for the trial court to determine what weight ought to be given to those two letters as the learned magistrate had the audio-visual advantage to assess the evidence of DW11, whom he had seen and heard and it is not for this court to substitute that finding of fact on both exhs D4 and P10, as both exhs D4 and P10 are admissible evidence, although not as statutory declarations.

This court is of the view that DW11, an educated person, being a teacher at the defendant's school at the material time, cannot be allowed to deny the contents of exh D4 at the trial and to change her mind for reasons best known to her and portray herself to be naïve. She took her oath and testified in Bahasa Malaysia at the trial and the contents of both exhs D4 and P10 are also stated in Bahasa Malaysia. She had the opportunity to lodge a police report at the time when she signed the second letter, exh P10, if she was forced to sign exh D4, but she did not do so. The learned magistrate, therefore, made a correct finding that the doctrine non est factum has no application to the facts in this case. The learned magistrate had correctly rejected her evidence. This court, therefore, declined to interfere with that finding of fact made by the learned magistrate on this aspect.

The learned counsel for the plaintiff had also raised in his grounds of appeal that the anonymous letter should not have been considered by the learned magistrate. This court is of the view that the learned magistrate did not take into account the contents of the said letter. All that the learned magistrate correctly did was that he considered that such a letter was in fact received by the Education Department and a copy was forwarded to the defendant with instructions to carry out an investigation and to forward a report to the Education Department. This fact that the said anonymous letter was received by the Education Department which alleged immoral conduct by DW11 was not denied by DW11 and the learned magistrate did not under any circumstances admit or take into consideration the truth of its contents of the said letter IDD5. This court is of the view that for the purpose of this case, all that was relevant was that such a letter existed and it was received by the Education Department and this was confirmed through exhs D1, D2 and D3, and the testimony of the defendant, his witnesses DW2, DW4, DW5, DW6 and DW10. Therefore, the learned magistrate was not prejudiced or clouded when he considered that such a letter existed as he did not admit the contents of the said letter. The learned magistrate had merely considered the circumstances in which the particular anonymous letter IDD5 was received by the Education Department and did not admit the contents of the said letter IDD5. In fact, the root of the entire episode in this matter was the said anonymous letter which, subsequent to several events, led the defendant to lodge the police report and who was subsequently slammed with the defamation suit.

Therefore, the contention of the learned counsel for the plaintiff that the learned magistrate had erred in law when he admitted the said letter cannot be sustained because the contents of the said letter has very little evidential value to the facts and issues in this case and could be disregarded. On the other hand, although the anonymous letter IDD5 is not directly an issue to this defamation suit, it cannot be denied that it is so connected with the facts in issue so as to form part of the same transactions that it becomes relevant to the matters in issue without having to consider the contents of the said letter for this case (see s 6 of the Evidence Act 1950).

As to the threat by the plaintiff, the defendant's evidence is corroborated by the evidence of his witnesses, DW7 and DW8, that DW11 had informed the defendant of the threat by the plaintiff and, coupled with exh D4 and the evidence of DW3, confirms that the defendant was told by DW11 of the threat by the plaintiff. In the circumstances, it was only natural for the defendant to have lodged the police report. The fact that the defendant did not in his police report mention certain facts as raised by the plaintiff's counsel, namely, that he was instructed by his superior, DW4, to lodge the police report and that DW11 was the girlfriend of the plaintiff does not, in the view of this court, give less weight to the defence of qualified privilege nor does it strengthen the averment of malice against the defendant. The fact that the defendant did not include those facts in the police report would only tend to show that the defendant had honestly relied on the threat conveyed to him by DW11 and that his sole purpose of lodging the police report was for his protection and safety and cannot be for any other ulterior motive, whether directly or indirectly or with malice. In *Chock Kek Ling v Patt Hup Transport Co Ltd & Ors* [1966] 1 MLJ 120, Raja Azlan Shah J (as His Royal Highness then was) said at p 121:

> I find as a fact that there was this heap of gravel on the road as was told to us by the second defendant as well as the fourth defendant. Mr. Keith Sellar has attacked the report lodged in which the fourth defendant had failed to mention that fact. To this I would say that *the report does not and will not contain everything under the sun. It is merely the first step to bring the police machinery into effect*. Be that as it may, his client (the second defendant) has admitted in evidence that there was this heap of gravel. So there was. Learned counsel cannot have it both ways. (Emphasis added.)

In the circumstances, this court is of the view that the omission on the part of the defendant to state that DW11 was the girlfriend of the plaintiff and the defendant was instructed by DW4 to lodge the police report could not have affected or casted any doubt on the bona fides of the defendant, who honestly believed that the information given by DW11 to him was true, which led him to lodge the police report. A layman cannot be expected to carry out regular search and form a judicious assessment of probative value on the information given to him, in this case by DW11, before he proceeds to report the matter to the police if so long as he has positive or honest belief in the truth of what he has reported to the police and for this purpose, the law affords the defamer the protection of qualified privilege (see *Gatley on Libel and Slander* (9th Ed)).

Based on the totality of the evidence, the plain truth is that the police report by the defendant was never intended for the police to call for the plaintiff to the police station or to jeopardise his reputation, if any. The defendant did not authorise the arrest of the plaintiff, if at all he was arrested as alleged, nor is there any evidence that he had pressed the police to investigate his report. In order to consider the defendant's honest belief, it is important to consider this particular sentence in the police report which reads: 'Oleh itu saya berasa risau sesuatu kejadian yang tidak diingini mungkin berlaku pada diri saya. Saya melapurkan perkara ini kepada pihak polis.' This part of the police report clearly shows that he was concerned about his safety and nothing else. Further, the fact that the defendant had mentioned in his police report that he was informed by DW11 also clearly shows that he honestly relied on what was told to him by DW11. Also, another factor which carries weight to his belief is that the defendant had previously raised it in his investigation report, exh D2, to his superior that DW11 had informed him that it was the plaintiff who had written the anonymous letter about her to the school and she had also given reasons why she believed that it was the plaintiff who had written the anonymous letter. It is important to state once again at this stage that exh D2 was written by the defendant to his superior prior to the police report which was lodged on 1 August 1990. This court is of the view that the events which led to the police report by the defendant has to be considered in its totality to determine whether the decision of the learned magistrate was correct.

On the facts and circumstances of this case and on the admission by the plaintiff that the defendant had no reason to lodge the police report against him, the only inference that can be raised is that the defendant had not been actuated by personal spite and that he had honest belief that what he had stated in his police report was true. There is no evidence that the defendant was induced by anger or spite or the desire to injure or to obtain private advantage or some improper purposes prior to lodging the police report. There is no evidence that he had abused the occasion or that there was gross and unreasoning prejudice that would have led him to lodge the police report. This is not a case that there was lack of foundation for the defendant to have lodged the police report. In the circumstances, the allegation of malice against the defendant must fail. In fact, once qualified privilege is pleaded and proved by the defendant, the plaintiff must show that the defendant was actuated by express malice, that is, by spite or ill will or some other wrong or improper motive (see *Robin v Sunrise Investments (Pte) Ltd & Anor* [1991] 2 MLJ 517).

In *Croucher v Inglis* (1889) 16 R , Lord Shand said at p 778:

> When a person has reason to believe that a crime has been committed, it is his duty and his right to inform the police.

This duty was further emphasized by Lord President Inglis in *Lightbody v Gordon* (1882) 9 R 934, where His Lordship said at p 937:

> When it comes to the knowledge of anyone that a crime has been committed, a duty is laid on that person, as a citizen of the country, to state to the authorities what he knows respecting the commission of the crime; and if he

> states only what he knows and honestly believes, he cannot be subjected to an action of damages merely because it turns out that the person as to whom he has given the information is, after all, not guilty of the crime.

In *Green v Chalmers* (1878) 6 R 318, Lord Ormidale said at p 320:

> It is a settled rule or principle of law that where an individual gives information or makes a statement to an officer of the law, whose duty it is to detect and prosecute criminals … to the effect that someone has committed a crime, such information or statement has the protection of privilege. This is so in the best interest of society, and the repression of crime could not otherwise be enforced.

In *Lightbody v Gordon*, Lord Adam said at p 942:

> People would be prevented from doing their duty if a man who honestly believed that he could give information to the police with reference to a crime felt that he could do so only with the terror of an action of damages hanging over his head.

This court has considered the entire authorities submitted by the plaintiff's counsel vide encl 55 and the other authorities handed in open court and is of the respectful view that those cases were decided on the particular set of the particular facts and does not apply to the set of the particular facts in this case. Some of the cases relied on by the plaintiff's counsel can be distinguished and are as follows.

In *Lee Kuan Yew v Derek Gwyn Davies & Ors* [1990] 1 MLJ 390, the plaintiff's claim against the defendant was for damages for libel in respect of statements contained in an article, published in the *Far Eastern Economic Review*. The defendants were the editor of the *Far Eastern Economic Review*, the author of the article complained of and the publishers and printers of the *Far Eastern Economic Review*. One of the issues raised in that case was whether the statement concerned the plaintiff as a person and as Prime Minister of Singapore and in relation to his conduct therein and whether the words complained of viewed in the context of the article was understood to refer to him which the plaintiff claimed were defamatory of him. The defendants by their defence denied that the words in the statement referred to the plaintiff or bore any meaning defamatory of the plaintiff. In the alternative, they raised the defences of justification and fair comment. In addition and in the further alternative, they raised the defence of qualified privilege based, inter alia, on the duty of the defendants as members of the media to provide information to the public, which facts and circumstances are not similar to the facts in this instant case.

In *Sandison v Malayan Times Ltd & Ors* [1964] MLJ 332, the plaintiff claimed damages for libel in respect of an article published by the defendants in their newspaper in respect of the plaintiff's dismissal by his employers. The plaintiff claimed that the article meant and was understood by readers of the newspaper to mean, inter alia, that the plaintiff was the person referred to therein and that he was guilty of corruption and dishonest dealing, and he could be convicted on a charge of corruption if he was charged in the criminal court. As a result, the plaintiff claimed that he was

greatly injured in his credit and reputation and in his career as a rubber planter and has been brought to public scandal, odium and contempt. The defendants relied on justification and claimed that the words complained off were true in substance and in fact and published bona fide and without malice. In that case, one of the issues was whether an offer of amends under s 7 of the Defamation Ordinance 1957 was made as soon as practical after the defendant had received the notice of action that the publication was or might be defamatory of the plaintiff, as there was a delay of one month between the date of the plaintiff's notice and the defendant's reply.

However, in the instant case, the defendant did not offer to amend under s 7 of the Defamation Act and failure to do so cannot be taken against the defendant because, on the facts, he had relied on what was conveyed to him by DW11 of the threat by the plaintiff and this was confirmed by DW7 and DW8. The case of *Sandison* has no application to the facts in this appeal.

In *Bank of China v Asiaweek Ltd* [1991] 2 MLJ 505, the plaintiffs were bankers and the defendants published a statement in a magazine concerning the operation of the bank as a result of political repression in China, wherein the Singapore Chinese withdrew US$75m. The bank had no alternative but to suspend the bank temporarily. The defences were, firstly, a bare denial that the words complained off were defamatory to the plaintiff and, secondly, the statutory defence under s 7 of the Defamation Act. The issues were construction of the words published in the magazine and whether an offer of amends was made as soon as practical and within the time framed prescribed in s 7 of the Defamation Act after the defendants received the notice of action from the plaintiff and whether the purported offer complied with the provisions of s 7(3)(b) of the Act.

On the facts and circumstances of this instant case, s 7 of the Defamation Act has no application and it is not fatal to the defence case if the defendant did not respond to the notice and/or the reminder from the plaintiff's solicitors.

In *S Pakianathan v Jenni Ibrahim* [1988] 2 MLJ 173, the plaintiff's claim was in respect of three letters dated 7 September 1981, 1 October 1981 and 2 October 1981, respectively, and another letter dated 13 October 1981 written to certain persons whom the plaintiff claimed the defendant had falsely written and published defamatory words of her and of her in the way of her occupation as a director of the Pusat Pertolongan Bhd ('the Pusat') and in relation to her conduct therein. She averred that in their natural and ordinary meaning, those words meant and were understood to mean that during her term of office with the Pusat, she had committed breach of trust and converted to her own use moneys belonging to the Pusat and had committed a criminal offence. Consequently, she alleged that she has been seriously injured in her character, credit, reputation and has been brought into public scandal, odium and contempt.

At the second annual general meeting of the Pusat on 29 June 1981, the defendant was elected chairman of the board of directors and also as the executive managing director and the plaintiff was re-elected as a director of

the Pusat. Subsequently, on 26 August 1981 at an emergency meeting of the board of directors, the board decided that the plaintiff should take over from the defendant as the executive managing director. In his amended statement of defence, the defendant averred the words complained of were true in substance and in fact, ie justification, alternatively, it was pleaded that the words were published on an occasion of qualified privilege. The plaintiff filed a reply to the amended statement of defence whereby she pleaded that the defendant was actuated by express malice to publish the defamation and gave particulars of the express malice.

In awarding damages against the defendant, the learned trial judge made a finding in respect of the fourth letter dated 13 October 1981 with a list of proposed resolutions attached to it, that there was malice on the part of the defendant and that the defendant was vindictive and malicious as a result of his having been removed as executive managing director and replaced by the plaintiff and the publication was libellous. On appeal by the defendant against the award of damages, His Lordship Wan Hamzah SCJ (delivering the judgment of the Supreme Court as it then was) confirmed the finding of the learned trial judge that the defendant's claim of privilege in respect of the publication of the accusation contained in the proposed resolution was defeated by the proof of his malice.

In *Rajagopal v Rajan* [1972] 1 MLJ 45, the plaintiff claimed damages against the defendant and one K Thangavelu for libel contained in a letter dated 11 June 1963 and the resolution passed at the annual general meeting of the Malayan Indian Congress ('MIC') Kuala Kangsar Branch on 2 June 1963. The parties to the action were members of the MIC Kuala Kangsar branch at all material times. Thangavelu was the president and the defendant was the secretary. The action against the said Thangavelu abated for reason of his death as a result of a motor accident. The plaintiff complained that the defendant had published certain documents, namely, the letter dated 11 June 1963 which contained defamatory imputations against him, which was set out in the statement of claim. In addition to the publication of the said letter, the defendant had sent carbon copies of that letter to 19 other persons, including the Minister of Internal Security, the Minister of Education, the Minister of Works & Posts, the Chief Education Adviser, Ministry of Education, the Chief Education Officer, Perak, the Chairman, Board of Governors, Malay College, Kuala Kangsar, the Honourable Judge, High Court, Ipoh, the Honourable President, Sessions Court, Taiping, the Headmaster, Malay College, Kuala Kangsar, the Chief Police Officer, Perak, OSPC Kuala Kangsar, the Honourable Mentri Besar, Perak, the Honourable State Secretary, Perak, the Deputy Mentri Besar, Perak, the Honourable Assistant Minister of Labour, Mr DS Dorai Raj, AMN, PJK, the Honourable President, MIC Perak, Mr KR Ramalingam, PJK, the Honourable Secretary, MIC, Perak, the General Secretary, MIC, Headquarters, Kuala Lumpur. The plaintiff alleged that the words used by the defendant in the said letter were understood to mean that the plaintiff had been guilty of causing unrest among the people in Kuala Kangsar, had disturbed the peace of several communities in Kuala Kangsar and had indulged in such undesirable activities which were sufficient for the various

persons to whom copies of the documents had been sent to act upon such manner that would have been detrimental to the plaintiff, that is to say, amongst the persons:

(1) the Minister of Internal Security to order the plaintiff to be deported from Malaya;

(2) the Minister of Education to order the dismissal of the plaintiff from teaching or acting against the interest of the plaintiff's profession;

(3) the President and the Vice President of the MIC to consider the plaintiff as an irresponsible and undesirable member of the political organisation;

(4) in order to prejudice the reputation of the plaintiff in the estimation of the Judge, High Court, Ipoh, the President, Sessions Court, Taiping, the Mentri Besar, Perak, Ipoh, the State Secretary, Perak, Ipoh and the Deputy Mentri Besar, Perak, Ipoh;

(5) the Chief Police Officer, Perak, Ipoh or OSPC Kuala Kangsar may order that the plaintiff be arrested or do such actions which were likely to interfere with the liberty and freedom of the plaintiff.

By the statement of defence, the defendant denied that the documents contained defamatory imputations concerning the plaintiff and further pleaded qualified privilege and fair comment. The learned trial judge found the forwarding letter to have been of defamatory character and rejected the defence of qualified privilege as the defendant had exceeded his duty as secretary of the branch by sending copies of the resolution to persons he was not required to send them to and there was evidence of express malice.

In *JB Jeyaretnam v Lee Kuan Yew* [1979] 2 MLJ 282, the plaintiff, the then Prime Minister of Singapore, brought an action against the defendant for defamation arising out of remarks made by the defendant, the leader of an opposition party, in an election speech which was in fact a reply to a press conference held by the plaintiff. In his defence, the defendant denied the said words bore or understood to bear any of the meanings alleged in the statement of claim to mean or have any meaning defamatory of the Prime Minister. The defendant further raised the plea of fair comment and qualified privilege. The trial judge rejected the defence of qualified privilege as His Lordship found that the words were published by the defendant without an honest belief in their truth and with the intention of denigrating and insulting the plaintiff and in publishing those words, the defendant was actuated by malice. In fact, the learned trial judge found for the plaintiff and held that the words complained off bore the meaning that the plaintiff had procurred the grant or favours to M/s Lee & Lee, of which his wife was the Senior Partner, and to his family and that the plaintiff had been guilty of nepotism and corruption and were defamatory of the plaintiff. On appeal, the Court of Appeal held, inter alia, that the finding of the learned trial judge was clearly on his own assessment of the credibility of the defendant and that the defendant published the words without an honest belief in their truth and with the intention of denigrating and insulting the Prime Minister.

In *Abdul Rahman Talib v Seenivasagam & Anor* [1966] 2 MLJ 66, the plaintiff had claimed damages for slander in respect of a verbal statement made by the first defendant and for libel in respect of a written statement made by the first and second defendants alleging corrupt practices by the plaintiff. The first defendant in his amended statement of defence pleaded qualified privilege, fair comment and justification. The second defendant pleaded justification. The trial judge rejected the defence of qualified privilege and accepted the defence of justification based on the facts and the circumstances in that case. On appeal, the Federal Court gave considerable weight to the views of the trial judge on the relative credibility of the witnesses and confirmed the decision of the learned trial judge that taking the evidence as a whole, in that case and on the balance of probabilities, the defence of justification succeeded. However, the facts and circumstances in *Abdul Rahman Talib*'s case are entirely far apart from the facts and the circumstances in the instant case before this court, and has no application to this appeal.

In *Syed Husin Ali v Syarikat Penchetakan Utusan Melayu Berhad & Anor* [1973] 2 MLJ 56, the plaintiff, a lecturer at the University of Malaya, claimed for damages in libel contained in the *Utusan Melayu* newspaper, of which the first defendant were the proprietress printers and publishers and the second defendant the editor. The plaintiff alleged that the news report contained defamatory imputations against him. In their statement of defence, the defendants admitted publishing the news report in Jawi script, but denied that the words complained of were defamatory of the plaintiff. In that case, the only issue was whether the words complained off were defamatory of the plaintiff. The statement of defence did not contain the defence of justification, fair comment or qualified privilege. Therefore, that case has no relevance at all to the facts in the instant case and is only relevant for the purposes of assessment of damages.

In *Hasnul bin Abdul Hadi v Bulat bin Mohamed & Anor* [1978] 1 MLJ 75, the plaintiff claimed damages for libel contained in the issue of the *Utusan Melayu* dated 7 April 1964. The defendant averred that the words used were not actionable per se and denied that they bore or were understood to bear or were capable of bearing a defamatory meaning or being understood to bear any of the meanings as alleged in the statement of claim. In addition, the defendants also raised the common defences of justification, qualified privilege and fair comment. The trial judge in rejecting the defence of qualified privilege found, on the facts in that case, that both defendants knew of the denial made by the plaintiff, yet they caused the defamatory words to be published. His Lordships also found the admission of the first defendant as damaging when the first defendant said that he had not made up his mind if the plaintiff had actually made the allegations or not when they were published on 7 April 1964.

In *International Times & Ors v Leong Ho Yuen* [1980] 2 MLJ 86, the plaintiff brought an action for defamation against the defendants in respect of a letter published in the *Sarawak Times* and the *Sarawak Siang Pau*. The defendants' main defences were justification and fair comment. The learned trial judge, after considering the evidence before him, held that the

defendants had failed to establish either or both of these defences and gave judgment for the plaintiff. The defendants appealed. The issue in that case was whether the onus of proof had shifted onto the plaintiff to lead evidence in rebuttal once the defendants had adduced evidence to support the two defences. On appeal, Salleh Abas FJ (in delivering the judgment of the Federal Court) held that the onus was still on the defendants to prove the truth of their imputations as the defendants had relied on justification and fair comment, and as the defendants had failed to do so, judgment was rightly given for the plaintiff.

In *Henry Wong v John Lee & Anor* [1980] 2 MLJ 254, the plaintiff claimed damages for defamation against the defendants wherein the first defendant, a fellow employee of the second defendants' firm, wrote a letter to the plaintiff with copies of the letter dated 23 June 1970 to the Sarawak Commercial Employee Union, the Managing Director and/or Secretary of the second defendant. The defendants' main defence was provocation and they also raised the defence of qualified privilege. On the facts in that case, the trial judge found that the defendants had exceeded the exigency of the occasion and the words were published by the first defendant recklessly and without an honest belief in their truth and with the intention of insulting the plaintiff and in publishing those words, the first defendant was actuated by malice.

In *Institute Of Commercial Management United Kingdom v New Straits Times Press (Malaysia) Bhd* [1993] 1 MLJ 408, the plaintiff claimed damages against the defendant for libel in respect of the words contained in an article published by the defendants in the *New Straits Times* dated 29 April 1985. The issues involved in that case were not related to the defence of qualified privilege and, therefore, has no relevance. The defences raised in that case were justification and fair comment.

In *Tun Datuk Patinggi Haji Abdul-Rahman Ya'kub v Bre Sdn Bhd & Ors* [1996] 1 MLJ 393, the plaintiff, the former Chief Minister and Governor of Sarawak, claimed damages and an injunction against the defendants for libel published in an article in a local newspaper, *The People's Mirror*, on 22 June 1986. The first defendant was the publisher of the newspaper while the second and third defendants were the printer and editor of the newspaper, respectively. The defendants contended that the words complained of in the article were not defamatory of the plaintiff and further argued that even if such words were defamatory of the plaintiff, they would rely on the defences of justification, fair comment and qualified privilege. The learned trial judge, His Lordship Richard Malanjum J, held on the facts in that case that the defence of qualified privilege failed on the balance of probabilities and that journalists, editors and newspapers did not have any special position as to entitle them to rely on the defence of qualified privilege on any matters which they published.

In the circumstances, the authorities submitted and relied on by the plaintiff's counsel were not of much assistance to the plaintiff's appeal as the facts and circumstances in those cases were entirely different and did not apply to the instant case.

On the other hand, the authorities referred to by the defendant's counsel were of assistance to this instant appeal. In *Horrocks v Lowe* [1974] 1 All ER 662, His Lordship Viscount Dilhorne, in delivering the judgment of the House of Lords, held that although gross and unreasoning prejudice could give rise to an inference of malice where it constituted evidence that the defendant had been indifferent to the truth or falsity or what he had said, it could not do so in a case where it had induced him to belief in the truth of his allegations and where there was no other circumstances from which malice could have been inferred. The plaintiff's appeal was dismissed.

In *Robin v Sunrise Investments (Pte) Ltd & Anor* [1991] 2 MLJ 517, the plaintiff filed an action against the defendant for malicious prosecution and libel on account of a police report made on 15 March 1983 by the second defendant on behalf of the first defendant against the plaintiff. The defendants' defence was, inter alia, qualified privilege and counsel for the plaintiff conceded that the police report and the letter of 15 March 1983 was written on an occasion of qualified privileges. In dismissing the plaintiff's claim for defamation, the learned trial judge found that there was no malice shown and, therefore, the defence of qualified privilege succeeded.

In *Lightbody v Gordon*, Lord President Inglis said at p 937:

> it is a settled rule or principle of law that where an individual gives information or makes a statement to an officer of the law, whose duty it is to detect and prosecute criminals … to the effect that someone has committed a crime, such information or statement has the protection of privilege. This is so in the best interest of society, and the repression of crime could not otherwise be enforced.

This court is of the view that the finding of the learned magistrate was a specific fact based on the totality of the evidence before the court and this court is unable to find any error on the facts or in law which justifies any interference by this court. The finding of the learned magistrate that DW11 was not worthy of any credit was based on the facts presented to him and since the learned magistrate had the advantage of having seen and heard the witnesses, this court is unable to substitute the opinion of the learned magistrate. The learned magistrate had read so meticulously the evidence, after which he came to a correct finding of fact which this court would not be justified in interfering.

In the circumstances, having considered the totality of the evidence, the submissions of both the learned counsels and the authorities referred to, this court is of the view that the learned magistrate was correct in dismissing the plaintiff's claim. Accordingly, the plaintiff's appeal is dismissed with costs.

Appeal dismissed.

Reported by Anita Teo